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# More tales from heritage hell

Law, policy and practice of archaeological heritage protection in Austria

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**Abstract:** *The Austrian Denkmalschutzgesetz (heritage protection law) aims to give total protection to all archaeological heritage. To achieve this, it takes a ‘finds-centred’ approach: chance finds are protected by some provisions in the law, searching for archaeology is restricted severely, and exclusively to archaeology graduates, by others. Yet, what has been completely forgotten is that most archaeology, and particularly the most threatened archaeology, is the one that has neither been found yet nor is being searched for. The reasons for why this approach was taken are both historical and rooted in archaeological prejudices and self-interest. The law was first passed in 1923 and has since only been revised in ways that served to give archaeologists greater legal control (or in other words, ownership) over what is archaeology and what should happen to it. Yet, significant changes to the way farming, forestry and development works in the contemporary world were completely missed, and no serious attempts made to identify where archaeology might be actually threatened. In this paper, I examine how the Austrian archaeological heritage hell came to be and what lessons can be learnt from it.*

**Keywords:** archaeology, heritage, management, Austria, excavation, survey

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In a previous issue of HEN (Karl 2011a), I highlighted some absurdities resulting from § 11 (1) Austrian *Denkmalschutzgesetz* (DMSG) for portable antiquities. This article raised some wider interest and drew some responses, most notably a rather critical one from Paul Barford in his blog<sup>1</sup>, not least accusing me of ‘artefactocentrism’. And where my article in HEN 2/2 is concerned (which after all was mainly about effects of § 11 (1) DMSG on portable antiquities), he certainly has a point, a point that actually is more relevant than he himself may be aware. ‘Finds centrism’ is indeed a crucial issue here, but not in that I might be an ‘artefactocentrist’<sup>2</sup>, but rather that the law I took a critical look at is almost exclusively ‘finds-centred’. In this article, I want to revisit the offending paragraph of the DMSG and demonstrate the wider implications of the ‘finds-centred’ approach Austrian heritage law takes to archaeology.

This examination of the Austrian situation, however, serves only as a case study to highlight wider implications of heritage laws devised in the late 19<sup>th</sup> and early 20<sup>th</sup> century, that have since hardly been revised. It also serves to highlight that the ‘authorized heritage discourse’ (Smith 2006, 29-34) has serious consequences in law, policy and practice; to the detriment of the (archaeological) heritage that (professional) authorities aim (and claim) to protect. It also touches on issues of ownership and rights to use heritage (e.g. Carman 2005; Karl 2013a); and the role of law in archaeology (e.g. Carman 1996). If our laws, policies, and practices are more concerned with protecting professional control over archaeology (and other types of heritage like the built environment, etc.), than they are with protecting the actual heritage – as heritage protection laws in many countries, and indeed many international conventions (see for instance Art. 3 of the Valetta Convention, CoE 1992), seem to be – they are likely to do more harm than good. The Austrian case just illustrates this particularly clearly.

## § 8-11 DMSG

Generally, every man-made object (including any objects and features of the ground transformed by human action and their remains) is referred to as a *Denkmal* ('monument') in § 1 (1) Austrian DMSG, but that is not specific to archaeology. Nor is the possibility to schedule any such monument of local, regional or national importance given in §§ 2, 2a and 3 DMSG, but equally applies to works of art and architecture, etc..

Archaeology is covered in the DMSG in 4 main paragraphs: § 8-11 DMSG. § 8 DMSG covers the chance discovery of archaeology (mainly understood to be small finds) and determines the duty of finders to report artefacts to the authorities, primarily the National Heritage Agency *Bundesdenkmalamt* (BDA). § 9 DMSG establishes a temporary protection for these artefacts (lasting up to 6 weeks for portable antiquities unless restrictions are lifted earlier by an official of the BDA) and their context (lasting up to 5 days), and a possibility for the BDA to emergency-schedule the artefacts. § 10 DMSG concerns itself with the ownership of finds made on public property or during works carried out by public officials, assigning the state a 50% ownership in such objects and the right to compulsorily purchase the 50% share of the other part-owner (finder or landowner) at the real market value of the artefacts. § 11 DMSG, finally, covers intentional searches for archaeology, and establishes various conditions for conducting such searches.

As in my article in HEN 2/2, it is mostly § 11 (1) DMSG that must concern us here and thus warrants a closer examination. It states:

*„§ 11. (1) Research by changing the ground or the ground beneath water (excavation) and other research in situ with the purpose of finding and investigating moveable and immoveable monuments beneath the surface of the ground or water are only allowed with a permit by the National Heritage Agency, unless § 11 (2) and (9) stipulate different conditions (research excavation). Such a permit can only be issued to persons who have completed a University degree in an appropriate subject. ...“* (DMSG 1999, 1344)<sup>3</sup>

This is particularly significant for several reasons: firstly, it establishes a legal definition of the term *Forschungsgrabung* (research excavation). This is the only archaeological term actually defined in Austrian law. Secondly, it determines a wide range of activities as 'research excavations', in a way that clearly has no correlation with how the term is used in archaeology itself. Thirdly, it limits the right to conduct any such 'research excavations' exclusively to individuals who have completed a degree in a relevant (archaeological) subject. The consequences of this restriction for reports by members of the public of any (chance) finds of portable antiquities have already been discussed by me in HEN 2/2.

## How did § 11 (1) DMSG come about in its current form?

§ 11 (1) DMSG was not always as restrictive as it is today. It was already included in the first version of Austrian Heritage protection law, which came onto the statute book in 1923. Back then, it read:

*“§ 11. (1) Excavations with the purpose of finding and investigating moveable and immovable monuments are only allowed if agreed to by the National Heritage Agency.”* (DMSG 1923)<sup>4</sup>

In a major revision of the DMSG in 1978, the wording of this paragraph was only ever so slightly modernised by replacing the words *“if agreed to”* with *“with a permit”* (DMSG 1978, 1091).

An extensive commentary to this version of the law was published in 1979 by Norbert Helfgott, a jurist in the Ministry of Culture who had, according to the dust cover of this published commentary, been

*“regularly occupied with the matter and particularly with amendments to the heritage protection law”<sup>5</sup>. In this commentary, Helfgott also discussed the interpretation of § 11 (1) DMSG:*

*“Excavations with the purpose of finding [...] are also such where only very little soil is removed and the artefact has previously been located with a detection instrument, as is frequently the case when searching for hidden coins or other metal objects. [...] Such excavations are also prohibited without a permit by the National Heritage Agency.” (Helfgott 1979, 83)<sup>6</sup>*

Based on this interpretation of the law, a public authority responsible for prosecuting administrative offences, the *Bezirkshauptmannschaft Mattersburg* (roughly the equivalent of a county council), fined a metal detectorist who had collected 8 roman coins in 1982 ATS 5,000 (c. € 370) for violating § 11 (1) DMSG. The metal detectorist appealed this fine first at the next higher authority, the office of the governor of the *Burgenland*<sup>7</sup>, which upheld the fine. In doing so, it explained the term “excavation” in greater detail:

*“... Every archaeological object is a unique historical document, whose scientific investigation is the foundation for establishing material and immaterial culture of man in all periods of the past. The objects found are clearly cultural objects subject to the provisions of the Denkmalschutzgesetz, regardless of their material value, preservation condition and the frequency of their occurrence. The reason of the statutory provisions can only be that excavations with the purpose of finding and investigating moveable and immovable monuments are subjected to professional supervision as necessary to avoid destruction, change to or removal of cultural objects. According to the fining authority, ‘excavation with the purpose of finding’ includes ‘excavation’ with any tools (including hands) as much as ‘systematic archaeological excavation’ by archaeologists by means of stratigraphic area-excavation of objects. The use of ‘excavation tools’ (e.g. mechanical digger, shovel etc.) when expecting small finds would seem positively atypical for professional archaeologists, since these would incur a danger of destroying the objects.” (quoted in Supreme Court decision VwGH, 24.6.1985, 84/12/0213, 3-4)<sup>8</sup>*

The metal detectorist also appealed this decision at the Austrian Supreme Court, the *Verwaltungsgerichtshof* (VwGH). The VwGH upheld the legal interpretation that any excavation, even with just the hands, would fall under the provisions of § 11 (1) DMSG. However, it quashed the fine, since the metal detectorist from the start had consistently argued that he had not dug up anything, but just collected finds from the surface, using the metal detector just to locate the coins, which frequently were difficult to spot. He referred to the witness statement of the policeman who had stopped him, who had confirmed that the metal detectorist had no excavation tools with him. Neither the county council nor the office of the governor had questioned that statement. Thus, the VwGH concluded:

*“On the other hand, it follows from this correct legal interpretation of the lower authorities that an offence against the provisions of § 11 (1) DMSG cannot have been committed if only surface finds were collected.” (VwGH, 24.6.1985, 84/12/0213, 5)<sup>9</sup>*

Austrian archaeologists, particularly in the BDA, were upset: they had thought they had finally succeeded to secure a conviction under the provisions of § 11 (1) DMSG for ‘illegal excavation’; only for that conviction to be quashed by the VwGH because the metal detectorist had claimed he had never dug and thus not violated the provisions of § 11 (1) DMSG at all. Important archaeological finds were being lost to ‘evil looters’, and no useful legal instruments were available to stop them. Obviously, the law had to be changed.

Thus, in the next revision of the DMSG in 1990 (which, according to the commentary to the 1999 revision primarily focussed on archaeology; Bazil et al. 2004, 20), a new wording for § 11 (1) DMSG was introduced. It only marginally differs from the wording of the same paragraph in the current (1999) version in that it still allowed permits to be issued to people who had not graduated in archaeology. It stated in this regard that „... *a permit can only be issued to persons who have completed a University degree in an appropriate subject or – if they have completed a different, appropriate, non-university education – have proven their ability in an examination to a commission [...]. ...*“ (DMSG 1990, 3141)<sup>10</sup>.

The regulations for such examinations were to be published by ministerial edict, but since the Austrian archaeologists didn't like this, no regulations were ever passed and no examinations held. Thus, the passage on others without a university degree also being allowed to get a permit when able to prove their ability in an examination was dropped in the 1999 revision of the DMSG, leading to the current phrasing (DMSG 1999, 1344).

## Law and practice: 'research excavation' in Austria

In 2010, the legal definition of 'research excavation' in Austria was further specified by guidelines published by the BDA, now available in their fourth, revised edition dating to 2016 (BDA 2016). The *Richtlinien für archäologische Maßnahmen* (guidelines for archaeological measures) define quite specifically which activities are covered by § 11 (1) DMSG: excluded are only desktop analyses (effectively literature and database searches) and survey by remote sensing devices like airborne LIDAR or aerial photography. 'Research excavations' that fall under the provisions of § 11 (1) DMSG, however, are all archaeological measures *in situ*. This includes general walk-over surveys to collect surface finds, the purely visual examination of changes of the surface of the ground (e.g. to spot barrows), topographical surveys to identify archaeological features on the ground (including ground-based LIDAR surveys), any kind of auguring or soil sampling, any kind of geophysical prospection (including entirely non-destructive methods like magnetometry or GPR), and of course any actual excavation by digging into the ground (BDA 2016, 9-21); provided any of these are conducted with *“the purpose of finding and investigating”* archaeology.

This creates the rather strange situation that a 'research excavation' in Austria can, by law, be anything ranging from just looking into the next field to spot whether a bump in it might be a man-made burial mound or digging a miniscule hole with a spade to recover an item from the topsoil to a GPR survey, a large-scale rescue excavation using mechanical diggers to machine-strip several kilometres of topsoil to a small hand-dug trench excavated in the stratigraphic method. It goes without saying that much of this would not be considered a 'research excavation' in archaeological terminology; leaving aside that much too often, topsoil is machine-stripped even on proper research excavations in Austria (and elsewhere, see for recommendations some of the standard literature on archaeological excavation; e.g. Barker 1993, 100; Gersbach 1998, 17-20; Drewett 1999, 98; Roskams 2001, 93-95).

Making the purpose of a measure *in situ* – to find archaeology – rather than the likely threat any work *in situ* poses to the archaeology the legally decisive factor whether something is a 'research excavation' which requires a permit by the BDA leads to a whole range of archaeological heritage protection absurdities. For instance, digging a hole in the ground for the purpose of finding gold, or for removing metal contaminants from a field being prepared for organic farming does not require a permit by the BDA (unless it happens on a scheduled site), while digging exactly the same hole for finding a Roman coin does. Searching a field for Bronze Age barrows does not require a permit by the BDA if it is done by airborne LIDAR, but does if it is done by ground-based LIDAR or just by looking with the unarmed eye. If the law were consistently strictly applied (which of course it isn't, since that would

make life impossible), any electrician looking for live cables with a metal detector or magnetometer would have to have an archaeology degree and a permit by the BDA, while the person digging in the same spot for planting a tree could happily get electrocuted without requiring a permit by the BDA. And of course, a developer may happily choose a bulldozer instead of a JCB to dig out the foundations of a planned building with the purpose of trashing any archaeology that may be present (which after all is the purpose of destroying unfound rather than finding archaeology), while the passer-by who takes a peek into the hole to discover whether archaeology is actually being destroyed would need a permit by the BDA prior to taking the peek, since otherwise, he would violate the provisions of § 11 (1) DMSG. This is indeed a rare occasion where the law serves to ensure that no good deed should ever go unpunished.

## Finds-centred archaeological heritage protection and Austria in 1923

These problems arise out of a very simple fact: that Austrian archaeological heritage protection is almost entirely finds-centred and stuck in 1923, when the law was first put onto the statute book. Leaving aside scheduled archaeological sites and monuments<sup>11</sup>, only archaeology that has been found by chance or is searched for purposefully is protected by the law. Yet, the vast majority of archaeology, which has not yet been discovered by either chance or design, is not protected at all. This problem, incidentally, is not limited to the Austrian case alone: as yet undiscovered archaeology is unprotected by law in most countries, the exception being those states where archaeology is automatically the property of the state. In Austria, this problem exists mainly for historical reasons:

In 1923, the finds-centred approach seemed sensible enough. Back then, archaeology that had not been discovered and was not actively being searched for was well enough protected: farming and woodland management was done mostly by hand, at the most supported by horses or oxen. While the first working prototype of a tractor – a steam-powered caterpillar – had been invented in the late 1870ies and produced in the late 1880ies, the first popular tractor in the German-speaking countries, the *Lanz Bulldog*, was first used in 1921 and only went into industrial production in 1923 (Gebhard 2006), the year the DMSG had been passed. The thorough mechanisation of Austrian farming only happened after WW2, and the early tractors of the 1940ies had only about 1/10<sup>th</sup> of the power and 1/8<sup>th</sup> of the weight of their current equivalents (English Heritage 2003, 2). Chemical fertilizers also were not used on the same scales as today in the 1920ies. And in forestry, no mechanical harvesters were used either. Thus, archaeology in the fields and forests of Austria was reasonably well protected.

Equally, in the 1920ies, building development was very different from today. Firstly, a building development in 1923 was not much different from an archaeological excavation of that time: most digging, if not all, was done by hand, and only rarely and on the largest of developments, steam-powered mechanical diggers were being used. The main difference between a development and an archaeological dig thus was that at the latter, an archaeologist may have been present (and that may often have meant present in the next inn, where he was waiting for his workers to deliver any finds) and may have made the odd sketch or photo of particularly interesting features. With manual digging the norm, it was almost certain that any archaeological remains present would turn up as chance finds, since they could hardly be missed by the workers. And secondly, there was much less of it in the early 1920ies: not only had Austria just lost a World War and much of its Empire and thus was going through a serious depression, but most major developments conceived at the time, like the first Austrian motorway, had not even reached planning stage (Kreuzer 2012, 11). By 1923, only about 1-2% of the Austrian territory had been built up.

Thus, a finds-centred approach to solving the issue of archaeological heritage protection seemed entirely sensible. Anything that had not been found by chance and that nobody was looking for

purposefully was reasonably well protected. The only archaeology that was threatened was that which was being found by chance or that was actually purposefully searched for during archaeological excavations.

## Austria since 1923 and finds-centred heritage protection

Since then, the situation has dramatically changed. Farming and forestry have become thoroughly mechanised, the former supported by chemical fertilization (despite many Austrian farmers growing organic produce these days), the latter with harvesters that rip out whole trees with their stump and roots. Archaeology in the fields and forests thus no longer is well protected. Rather to the contrary, in the fields, chemical fertilization combined with deep ploughing is creating soil conditions in which at least finds that are already in the top soil are damaged at rather dramatic rates. And in the forests, the harvesters leave craters that are very suitable for replanting with new fast-growing timber monocultures, but which are trashing any archaeology present almost completely.

But even that is nothing compared to the pace of development. According to studies by the *Umweltbundesamt* (the Austrian Environment Agency), greenfield development was proceeding at a pace of c. 15-25 hectares per day in the years between c. 1971 and 1999 (Umweltbundesamt 2001, 23). Thus, in these c. 29 years alone, another c. 2000 km<sup>2</sup> or 2,5% of the Austrian landmass have been built over. By 1999, a total of 3,816 km<sup>2</sup> had been built over, which means that in the 29 years before, the built-up area had roughly doubled (Umweltbundesamt 2001, 35). Since then, the pace of greenfield development has kept up at the roughly the same rate in the years between 2007 to 2013. By 2010, a whopping additional c. 630 km<sup>2</sup> or 0.75% of Austrian territory had been built over, giving an average area of new greenfield development of c. 60 km<sup>2</sup> per year (Umweltbundesamt 2010, 188).

Under these circumstances, the finds-centred approach taken by the DMSG – which protects chance finds of archaeology by the provisions of § 8 DMSG and intentional finds by the provisions of § 11 DMSG – is certainly not adequate any more. What is most threatened is not the archaeology that has been found by chance or design, but the archaeology that nobody even knows about.

## Environmental impact assessment in Austria

But, the educated professional reader might now say, Austria is part of the European Union and must therefore have environmental impact assessment legislation. Environmental impact assessments must also give consideration to cultural heritage, including archaeological remains. And that is certainly true: Austria is required to implement the European directives 2001/42/EC (Strategic Environmental Assessment) and 2011/92/EU (Environmental Impact Assessment); and has done so through the *Umweltverträglichkeitsprüfungsgesetz* (UVP-G). According to this law, environmental impact assessments aim at determining the impacts of planned developments on humans, the living environment and a number of other things, including cultural heritage; and at finding possibilities to “... avoid or reduce damaging, polluting or encumbering impacts of the development on the environment or to increase beneficial impacts of the development...” (§ 1 (1) Z 1 UVP-G).

Thus, in the course of EIAs, the BDA can contribute to the proceedings and set conditions for the development if it is likely to affect cultural heritage, including archaeology. In fact, it does so frequently, as official expert opinions of the BDA are often requested in EIA and other similar proceedings (mainly concerning the development of strategic development plans by local authorities). In 2011 alone, staff in the archaeology department of the BDA wrote a total of 2,284 such expert opinions in EIA and similar proceedings that might have affected archaeology (Hebert and Hofer 2011, 20). This number certainly sounds impressive if taken at face value and would lead one to think that archaeology is well-protected by the environmental impact assessment process.

However, if one digs a little deeper and looks at these figures in context, any confidence one might have had quickly evaporates. After all, writing such expert opinions is just one of the many tasks that the archaeologist members of staff in the department of archaeology at the BDA need to complete in their demanding jobs. And in 2011, there were – in total – a mere 12 archaeologist members of staff working in this department. These 12, in addition to writing 2,284 expert opinions for EIAs and similar proceedings, had to conduct 152 *amtswegige Maßnahmen* (effectively, rescue excavations directed by staff in the BDA under the provisions of § 11 (2) DMSG; including such ‘small-scale’ ones as motorway and high speed rail development project rescue excavations), examine applications for and write 382 permits for ‘research excavations’ according to the provisions of § 11 (1) DMSG, schedule 25 archaeological sites or monuments, assess and approve 82 grant applications, and edit and publish 5 ‘official’ publications of the BDA, amongst these the usually c. 600 page *Fundberichte aus Österreich* (Hebert and Hofer 2011, 20), not even mentioning ‘normal’ administrative tasks or their non-quantifiable archaeological tasks, i.e. conducting a systematic archaeological survey of Austria. So in addition to all these other tasks, each member of staff in the department of archaeology of the BDA has to write about one such expert opinion per working day. It goes without saying that none of these opinions can be particularly detailed, or indeed be based on much research. Thus, these expert opinions are effectively based on the site database kept by the BDA, a register of all known archaeological sites in Austria.

The quality of the advice given by the BDA in EIAs and similar proceedings thus depends entirely on this database. And if one takes published statistics about the content of that database, it seems as if that database contains about 50,000 entries. This can be calculated from the activity reports of the department of archaeology in the BDA, which states that in 2008, a total of 48,493 sites had been included in that database, with entry for 96% of all Austrian counties completed (Farka 2008, 10). If one compares this to the number of more than 100,000 known archaeological sites in Wales<sup>12</sup>, an area that amounts in size to about one quarter of the landmass of Austria, or the c. 400,000 sites known in England<sup>13</sup> at c. 1.56 times the size of Austria, this shows how catastrophically low the number of sites known to the BDA in Austria actually is. One can thus reasonably safely assume that for every site the BDA knows and can set conditions for in EIA or similar expert opinions, at least 7 are unknown and thus will be missed. In effect, the EIAs and similar proceedings again allow only to protect the archaeology that has already been found, but do nothing at all to protect the archaeology that has not. It is the same finds-centred approach all over again.

There is one added issue, though, an issue that recently came to my attention quite starkly, since I was asked by the *Umweltdachverband* (the largest environmental issues charity in Austria, which boasts a whopping 1.3 million members in a country with a population of c. 8.5 million) to write an expert opinion (Karl 2013b) concerning a major A road<sup>14</sup> development through an archaeologically sensitive zone in the *Burgenland*. The development project concerned is a c. 5 km long bypass road around the village of *Schützen am Gebirge*; and is directed by that regional government. Despite it being known that the area was archaeologically sensitive, and despite this clearly being a major development project, no EIA was carried out, since the regional government ruled that this was not necessary according to regional legislation. No archaeological prospection to speak of was carried out prior to the works starting, even though during preliminary preparation work, several Roman burials had already been found and it was known from reports of chance finds from members of the public (pretty much annually until 1990, since then only sparingly; see Karl 2011a for the reasons for this dramatic change in reporting frequency) to contain a lot of archaeology. The conditions of contract in the tender documentation stated as the only archaeological requirements that works would have to be stopped for archaeological excavations when finds or relevant features became apparent. The whole track was to be stripped by mechanical digger of topsoil and intermediate soil under an



archaeological watching brief. No contract for an archaeological supervision of the works was put to tender, because it was deemed that the total value of the archaeological works required during the project was not going to exceed € 99,999, which is the legal threshold for projects having to be put to tender. Despite all this, the BDA issued the necessary permit to conduct these 'research excavations'.

So much for the protection exerted by EIAs and best archaeological heritage management practice in a region that just 30 years ago claimed that archaeologists would not use mechanical diggers to recover archaeological objects when it fined a metal detectorist for picking up 8 Roman coins. Which, incidentally, at the time was perfectly legal and only since has become the same kind of 'research excavation' as machine-stripping 5 kilometres of road track which happens to run through an archaeologically very sensitive area (including a major Roman cemetery), because we archaeologists must stop at all costs the damage that evil looters do to archaeological sites.

## Freedom of research?

Austria, in difference to, for instance, the UK, has a written constitution. Among the various constitutional laws there is the *Staatsgrundgesetz* (StGG), which determines the fundamental freedoms of Austrian citizens. It determines those rights of Austrian citizens which are deemed so fundamental that no one, not even the state, should be allowed to interfere with unless there are very compelling reasons. These include such fundamental rights as the principle of equality before the law (Art. 2 StGG), the freedom to own property (Art. 5 StGG), the freedom of taking up any legal profession (Art. 18 StGG), the right of privacy of the home, correspondence, post and telecommunications (Art. 9, 10 and 10a StGG), the right of assembly (Art. 12 StGG), the freedom of expression and prohibition against censorship (Art. 13 StGG), the freedom of religion (Art. 14-16 StGG) and other essential (human) rights. Among those is the freedom of scientific research and academic teaching (Art. 17 StGG). The latter determines that every Austrian citizen has the right to conduct scientific research freely and without undue interference by the state. An academic degree, or any other kind of qualification is not required for a citizen to have a right to exert this freedom (Berka 1999, 343).

Interestingly, § 11 (1) DMSG in its current form does not serve to properly protect archaeology, but it interferes severely with this freedom of scientific research. This is evident from the fact that even such archaeological measures require a permit that clearly do not threaten archaeology with any damage whatsoever, but actually serve to protect it or at least better enable its protection. For instance, there is no sensible justification for including looking into the next field with the naked eye to find potential archaeological features like barrows under the term 'research excavation' and requiring anyone who wants to conduct this activity to first complete an archaeology degree and get a permit from the BDA. Nor is there any justification for requiring a permit for conducting a GPR or Magnetometer survey, as neither is likely to cause any damage to archaeology. Even searching for metal objects with a metal detector is not inherently damaging to the archaeology; it is the digging that may (and often will) follow which may constitute a threat to archaeology. Searching for and even finding archaeology does not necessarily threaten it, quite to the contrary, it is a precondition to protect it, at least as long as the law supposed to protect archaeology is finds-centred rather than threat-centred.

In fact, § 11 (1) DMSG does little to protect the archaeology, especially that which has not yet been found, but is very effective in limiting the constitutional freedom of research guaranteed by Art. 17 StGG. It limits this freedom to doing research that the BDA approves, where the BDA approves, in the way that the BDA approves. And the archaeology suffers, thanks to this.

## Archaeological land survey in Austria

Under the finds-centred approach taken by the DMSG, where only archaeology that is known or likely to become known is actually being protected, the quality of the archaeological site database on which the BDA can draw is crucial. Yet, as shown above, this is a particularly neglected part of Austrian archaeological heritage management. The quality of this database directly depends on the amount of archaeological land survey conducted. And – hardly surprisingly, considering the number of tasks the 12 archaeologists employed for doing all archaeological heritage management in all of Austria have to do – that amount is minimal.

Archaeological land survey can be carried out in three different ways: by professional archaeologists, employed for the task by someone (which probably means the state or regional public authorities); under the direction of such professional archaeologists by members of the public who volunteer their time and labour; or by the public directly, reporting their finds, whether made by chance or by design, to the authorities responsible for keeping the site database. It should be stated most clearly that I as most other archaeologists would prefer the first option, can accept reasonably well the second option, and don't particularly like the third option. However, it must equally be stated that each comes with different advantages and disadvantages.

The first option is clearly the archaeologically most preferable one, since such a land survey will be conducted to professional standards and various specialists can be employed for aerial photography, LIDAR and geophysical surveys. This not only allows to speed up the site discovery process considerably, but also can provide useful additional information (like GPR surveys providing three-dimensional information about subsurface archaeological stratification). However, it comes with a major price-tag attached: to achieve a sensible coverage of Austria within a sensible time – say 25 years from the start – Austria would probably need to employ at least several hundred archaeologists for the task.

The second option also has several advantages, not least the fact that the outcome will at least be a reasonably systematic survey of the country of a reasonably decent quality. Disadvantages are the lesser quality of the results compared to a fully professional land survey and that it will probably take much longer than if done by professionals, and that it still costs quite a bit of money. At least 10 additional professional posts would be a minimum requirement for it, if not more.

The third option has few advantages, other than that it is better than no archaeological land survey to speak of at all. When I was saying in my paper in HEN 2/2 that the information about where sites are in Austria can currently only come from the public, which we have wilfully excluded by restricting the freedom of research to discover archaeological objects to archaeological professionals alone (Karl 2011a), this was the reality I was referring to: in Austria, at this time, this is the only source where such information can come from. The disadvantages are many. To mention just one: if the public is left entirely to its own devices, the likely outcome is not a systematic archaeological land survey of Austria for unknown sites, but mostly a collection of metal objects from sites already known.

Still, the third option has as its other major advantage that it costs nothing, and at least provides some information on new sites, even if only by chance and in comparably small numbers. Given the rather small chance that Austria will suddenly decide to at least almost double the archaeologist staff employed in the BDA to allow for option 2, and the utter impossibility that it will hire several hundred archaeologists for an option 1-type professional archaeological land survey<sup>15</sup>, option 3 is what Austrian archaeological heritage management is stuck with if it wants to improve its knowledge about where archaeological sites are to be found.

## The value of archaeological finds and archaeological discrimination

Before arriving at conclusions, let me shortly turn to a more general point: the value of archaeological finds (also see e.g. Carman 2005; Emerick 2014; Hebert 2014). Because there seems to be a major disparity between the value we assign to archaeological objects if others want to do anything with them, and the value we assign to them when we are in control. The two cases discussed in greater detail above, the metal detectorist (despite this conviction later having been quashed by the VwGH) originally fined ATS 5,000 for picking up 8 Roman coins without a 'research excavation' permit by the BDA and the industrial scale trashing of Roman (and other) archaeology by mechanical diggers in a 'research excavation' permitted by the BDA in *Schützen am Gebirge* (Karl 2013b), demonstrate this in devastating clarity.

Since § 1 (1) DMSG determines that any man-made object is a *Denkmal* (a 'monument' or 'cultural heritage'), and no criteria are introduced in the DMSG or have been published by the BDA as to what man-made objects cannot be a *Denkmal*, some additional criterion is needed to determine what man-made objects have to be protected by the law as cultural heritage and what not. Otherwise, modern life would become positively impossible: one would not be allowed to damage, change or export any man-made object without a permit by the BDA, and since normal use damages and changes every object, modern life would grind to a complete halt. This criterion, introduced in § 1 (1) DMSG, is the historical, artistic or other cultural significance of the object. The provisions of the DMSG thus cover only and exclusively such man-made objects whose significance creates a public interest in their preservation.

Whether this significance is sufficient to warrant the preservation of a man-made object, in turn, is determined entirely by the value assigned to the object by academic scholarship (Bazil et al. 2004, 38). While this is arguably more of an intuitive than an 'objective' judgement, grounded in common academic perceptions of what is, and what is not, 'archaeology', this is nonetheless a significant problem (see on this e.g. Emerick 2014, 10); not least since the question of how such value is to be determined seems to hardly ever be properly discussed in the German language heritage discourse (but see Hebert 2014), but exclusively '*passed on by example and word of mouth*' (Thompson 1981, 33). Yet, objects only fall under the provisions of §§ 8-11 DMSG if they '*could obviously be subject to the restrictions of this law*' (§ 8 (1) DMSG). How any member of the public is supposed to know what experts would intuitively consider to 'obviously' be a 'monument' is unclear. Yet, in practice, the judgement does not seem to be one about the (allegedly 'inherent', Bazil et al. 2004, 37; cf. Smith 2006, 29-30) value of the objects in question anyway.

Context apparently is everything in archaeology – though in how we assign value to archaeological objects, it seems not so much to be the stratigraphic contexts that matter, but rather the context of who is doing something with archaeological objects. Thus, if a member of the public dares to intentionally look for and pick up a few archaeological objects, we condemn him for destroying archaeology, because apparently, those finds are of such unimaginably high value that their loss would be insufferable. Yet, if we dig some archaeology, bulldozing hundreds or even thousands of archaeological objects is perfectly legal, permissible and apparently perfectly good archaeological practice, because the finds destroyed seem to be of no value at all. Topsoil finds – and it is almost exclusively topsoil finds that we are talking about in this context – apparently only matter, only have value, if others try to find them, but not if we, whether by design or thoughtless neglect, destroy them by mechanical digger<sup>16</sup>.

This discrimination – there is no other fitting word for it – against the general public is not justified by any real assessment of the threat to archaeology or actual damage caused by the actions of that public,

and even less based on a realistic comparison between the damage caused by this public and the damage caused by professional archaeologists during permitted and perfectly legal excavations. After all, the Roman coin, dug up by the 'looter', at least is recovered and may – if reported and made available to scholarship – still contribute to the understanding of human culture. The same Roman coin, trashed by a mechanical digger without being recovered or recorded on an archaeological dig, however, is lost for studying the past permanently and completely. Rather, it is exclusively based on self-serving notions of professionals, who consider themselves the only legitimate stewards and caretakers of 'the past' (Smith 2006, 29), and thus claim complete legal control, that is, ownership, of everything they consider to be 'heritage' (Karl 2013a, 142-7).

## Conclusions

§ 11 (1) DMSG is one major cornerstone of the finds-centred approach taken by Austrian heritage law to the protection of the archaeological heritage. The law, first introduced in 1923 and since not properly revised to adapt it to modern conditions, only protects archaeology that has either already become known by chance find, or that is actively being searched for. Unknown archaeology – the majority of all archaeology in Austrian soil – on the other hand, is not properly protected at all. The law not only restricts without proper justification the constitutionally guaranteed (in Art. 17 StGG) freedom of research of all Austrian citizens, it also is damaging to archaeology.

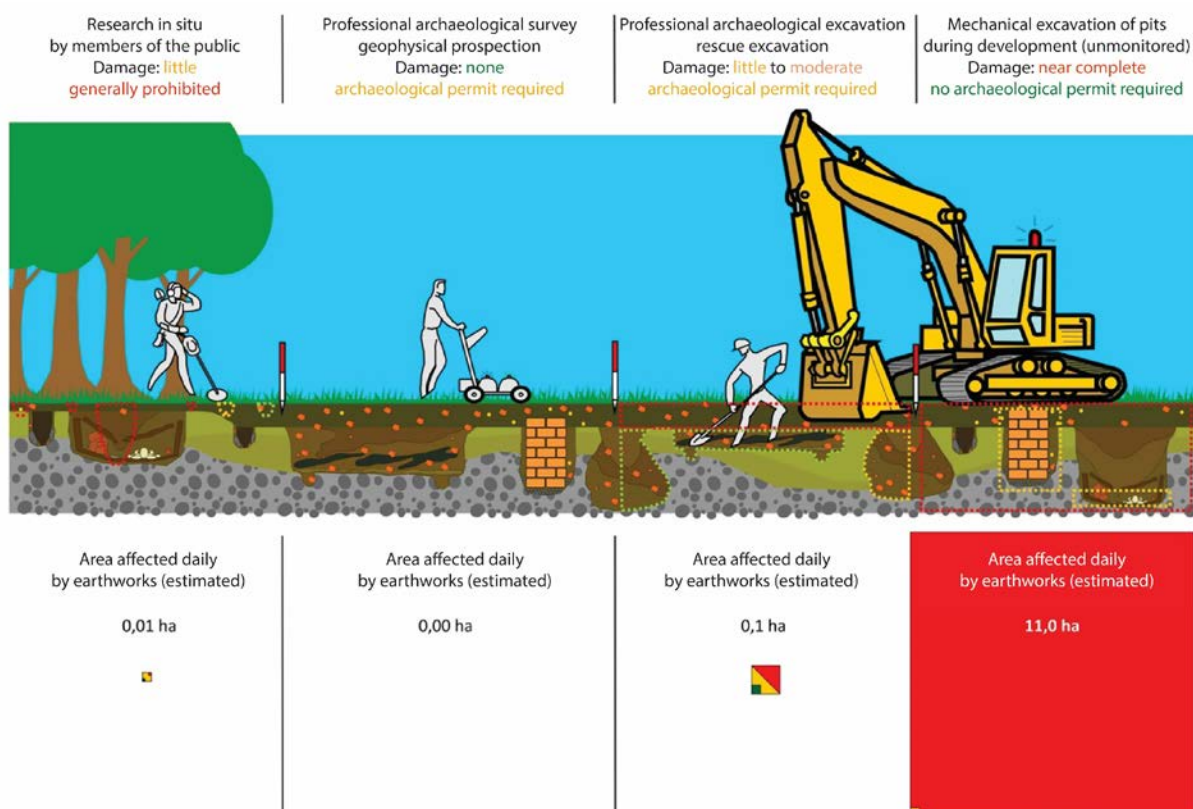


Fig. 1: Threat and prohibitions / permission requirements compared.

Arguably, the restrictions of § 11 (1) DMSG are inverse to the likely damage caused by works disturbing the ground (fig. 1). Minor disturbances of (mostly) the topsoil by members of the public searching for archaeology *in situ* are completely prohibited by this law. Proper archaeological excavations by professionals, which disturb much more of the stratigraphy and usually include topsoil-stripping with mechanical diggers, require a permit by the BDA which is almost invariably granted. Major

developments on the other hand, which trash archaeology undocumented on an industrial scale, require no § 11 (1) DMSG permit by the BDA at all.

The nature of these restrictions leads to archaeological heritage management absurdities of the highest order: while it is perfectly legal on development sites to bulldoze away archaeological stratigraphy unnoticed and unrecorded, looking into these development sites to detect whether archaeology is being destroyed requires the observer to hold a degree in archaeology and a specific § 11 (1) DMSG permit issued by the BDA to make his evil act of trying to protect archaeology legal. And while there is no proper systematic archaeological land survey of Austria, the only option that could provide information about where unknown archaeological sites are, however suboptimal this option may be, has been sealed off because we apparently have to protect unknown sites from looters more than from developers or other much more substantial threats.

Of course, there would be a rather simple solution for Austria: to replace this useless finds-centred archaeological heritage protection law with an at least somewhat smarter threat-centred solution (to be able to protect archaeology from damage from farming, forestry and development). Particularly for the protection from development threats, there would even be an already existing process that is required before any development can go ahead: the planning process. And there even are plenty of examples elsewhere that demonstrate that while certainly anything but ideal, protecting archaeology through the planning process at least is much more effective than any finds-centred solution.

As usual, there are wider lessons to be learned from Austria and its archaeological heritage protection hell. Firstly and most obviously, if you got an essentially unrevised archaeological heritage protection law that dates from the late 19<sup>th</sup> or early 20<sup>th</sup> century, it will probably be horribly outdated and no longer fit for purpose. Secondly, if your heritage laws take a finds-centred approach without being at least supplemented by a sensible threat-based approach through planning legislation, your country's archaeology is probably in a similar hell as is Austria's, and you need to start thinking about getting the law changed or supplemented. Thirdly, if you have no proper archaeological land survey to speak of and are barking at 'evil looters', you are probably barking up the wrong tree: you would certainly be well advised to check whether your country's laws protect its archaeology against the really serious threats it faces, or whether they allow development to destroy archaeology unhindered while you are wasting your limited resources to chase people who do comparatively little damage (and the majority of whom you will never catch anyway).

The most important lesson to be learnt, however, is an entirely different one. It has much more to do with the question of how the current Austrian archaeological heritage hell came to be, and who is to blame for it. Because the blame for this situation must be shared in equal parts by the government and archaeologists: while the Austrian government certainly has to bear the blame for starving the department of archaeology of the BDA of the necessary resources to properly do its job, the revisions of the DMSG that have made the situation immeasurably worse over the last few decades are to blame on archaeologists, mainly those in the BDA, their prejudices against the 'untrustworthy' public, and their wish to be exclusive owners of archaeology, that is, to have exclusive control of archaeology<sup>17</sup>. It is, essentially, the 'authorized heritage discourse' (Smith 2006, 29-34) that is mainly to blame for the problems of Austrian (archaeological) heritage protection.

After all, it is not the government, nor its jurists, who write archaeological heritage protection laws, but rather us archaeologists. While the politicians in government may impose general limitations of what can and what cannot be written into an archaeological heritage protection law, and the jurists may actually design the precise wording, it is the archaeologists who direct their pens. The government could not care less about who controls the fate of some Roman coins picked up on some

field in the country, nor could the jurists who actually pen the words of the law. It is the archaeologists, and only archaeologists, who get upset about someone else, particularly Joe Public, having the right to control the fate of what they consider to be 'theirs'. We want to control the fate of archaeology, a control we do not want to share, least of all with Joe Public. This, and only this, then leads to laws like the DMSG, which try to protect, not the archaeology, but our control over it.

And that is the main lesson to be learnt from the Austrian disaster: archaeologists write archaeological heritage protection laws, they formulate the heritage management policies, and implement those policies in practice. And if they let their prejudices and self-interest get the better of well-reasoned thought, the outcome is not the best, nor even adequate protection of archaeology, but rather an archaeological heritage hell. Thus, if you want to change heritage laws in your country, pay heed to the likely and most often entirely predictable consequences of what you wish for. Because if you don't, you might end up in hell and have only yourself to blame.

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<sup>1</sup> <http://paul-barford.blogspot.co.uk/2012/01/dr-karl-pas-and-austrian.html> and following 9 entries, accessed 25/10/2013.

<sup>2</sup> A charge that I, who over the last decade has excavated only on sites that are characterised by a distinct lack of artefacts and mostly has done desk-based research, would strongly reject.

<sup>3</sup> „§ 11. (1) Die Nachforschung durch Veränderung der Erdoberfläche bzw. des Grundes unter Wasser (Grabung) und sonstige Nachforschungen an Ort und Stelle zum Zwecke der Entdeckung und Untersuchung beweglicher und unbeweglicher Denkmale unter der Erd- bzw. Wasseroberfläche dürfen nur mit Bewilligung des Bundesdenkmalamtes vorgenommen werden, soweit Abs. 2 und 9 nichts anderes vorsehen (Forschungsgrabung). Eine derartige Bewilligung kann nur an Personen erteilt werden, die ein einschlägiges Universitätsstudium absolviert haben. ...“ (DMSG 1999, 1344)

<sup>4</sup> „§ 11. (1) Ausgrabungen behufs Entdeckung und Untersuchung beweglicher und unbeweglicher Denkmale dürfen nur mit Zustimmung des Bundesdenkmalamtes vorgenommen werden.“ (DMSG 1923, 1726-7)

<sup>5</sup> „...mit der Materie und insbesondere auch mit der Novellierung des Denkmalschutzes laufend befaßten Autor“ (Helfgott 1979, dust cover).

<sup>6</sup> „Ausgrabungen zum Zwecke der Entdeckung [... werden ...] auch dann vorgenommen, wenn diese Ausgrabungen nur ganz wenig unter die Erdoberfläche geführt werden müssen und der Gegenstand zuvor mit Meßgeräten aufgespürt wurde, wie dies etwa bei der Suche nach verborgenen Münzen und anderen Metallgegenständen häufig der Fall ist. [...] Auch derartige Ausgrabungen dürfen nicht ohne Bewilligung des Bundesdenkmalamtes durchgeführt werden.“ (Helfgott 1979, 83).

<sup>7</sup> One of the 9 territories that make up the federal republic of Austria.

<sup>8</sup> „... Jedes archäologische Kulturgut stelle ein einmaliges historisches Dokument dar, dessen wissenschaftliche Erschließung eine Grundlage zur Erfassung der materiellen und geistigen Kultur des Menschen für alle Zeitepochen darstelle. Bei den aufgefundenen Gegenständen handle es sich jedenfalls um Kulturgüter, die den Bestimmungen des Denkmalschutzgesetzes unterlägen, ungeachtet ihres materiellen Wertes, ihres Erhaltungszustandes und der Häufigkeit ihres Vorkommens. Sinn der gegenständlichen gesetzlichen Bestimmungen könne es nur sein, Ausgrabungen zum Zwecke der Entdeckung und Untersuchung beweglicher und unbeweglicher Denkmale nötigenfalls einer fachmännischen Überwachung zu unterwerfen und einer Zerstörung, Veränderung und Verbringung von Kulturgütern entgegenzuwirken. Nach Auffassung der belangten Behörde schließe die „Ausgrabung zum Zwecke der Entdeckung“ die „Ausgrabung“ mit welchen Gegenständen auch immer (auch Hände) ebenso mit ein wie die „systematische archäologische Ausgrabung“ durch den Archäologen in Form von flächenmäßiger und schichtmäßiger Freilegung von Objekten. Die Verwendung von „Grabinstrumenten (Bagger, Schaufel etc.)“ erscheine bei vermuteten Kleingegenständen für einen Facharchäologen geradezu atypisch, weil diesfalls die Gefahr einer Zerstörung des Gegenstandes gegeben wäre.“ (VwGH vom 24.6.1985 zu GZ 84/12/0213, 3-4).

<sup>9</sup> „Aus dieser zutreffenden Rechtsauffassung der belangten Behörde ergibt sich andererseits aber auch, daß ein Verstoß gegen die Vorschrift des § 11 Abs. 1 des Denkmalschutzgesetzes nicht in Betracht kommt, wenn nur Oberflächenfunde getätigt wurden.“ (VwGH vom 24.6.1985 zu GZ 84/12/0213, 5)

<sup>10</sup> „§ 11. (1) Die Nachforschung durch Veränderung der Erdoberfläche bzw. des Grundes unter Wasser (Grabung) und sonstige Nachforschungen an Ort und Stelle zum Zwecke der Entdeckung und Untersuchung beweglicher und unbeweglicher Denkmale unter der Erd- bzw. Wasseroberfläche dürfen nur mit Bewilligung des Bundesdenkmalamtes vorgenommen werden, soweit Abs. 2 nichts anderes vorsieht (Forschungsgrabung). Eine derartige Bewilligung kann nur an Personen erteilt werden, die ein einschlägiges Universitätsstudium absolviert haben oder die – soweit sie eine andere einschlägige, wenn auch nicht universitäre Ausbildung, nachweisen können – vor einer Kommission [...] durch eine Prüfung einen Befähigungsnachweis erbracht haben“ (DMSG 1990, 3141)

<sup>11</sup> For comparison purposes: there currently are about 1,000 scheduled archaeological sites and monuments in Austria (BDA 2007, 78 fig. 103), while in England, there are currently c. 19.800 scheduled archaeological monuments (<http://www.english-heritage.org.uk/professional/protection/process/national-heritage-list-for-england/>, accessed 2/3/2013). While England has c. 1,56 times the size of Austria, in England, only nationally important monuments can be scheduled, while the Austrian DMSG (in §§ 2, 2a and 3) also allows to schedule monuments who are of just local or regional significance. Thus, Austria should have at least 12 times as many scheduled archaeological monuments than it does, if not significantly more than that, to reach the same levels of scheduling as in England.

<sup>12</sup> <http://www.archwilio.org.uk>, accessed 2/3/2013.

<sup>13</sup> <http://www.pastscape.org.uk/>, accessed 28/10/2013.

<sup>14</sup> Please note that in Austrian terminology, this is a *Bundesstrasse*, abbreviated as B (Karl 2013b). The abbreviation A in Austria would stand for *Autobahn*, that is, a motorway or M road in British terminology.

<sup>15</sup> Although I would be best pleased if Paul Barford and other anti-looting activists would lobby the Austrian government to hire those hundreds of archaeologists, or at least the tens of archaeologists needed to enable a community archaeology land survey directed by professionals. Maybe they will have more luck than me who has been banging on about this for years now, with the expected degree of success (namely, none whatsoever).



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<sup>16</sup> This is despite the undoubted fact that some looters do occasionally dig holes in which *'one could if necessary bury a small car'* (Hebert 2011, 140; translation RK). While such major illegal excavations do occasionally happen, they still make up a tiny minority of all finds events in which members of the public dig up small finds. And none of this – even if one adds up all the 'normal' small 'looting holes' and the extraordinary 'large' illegal excavations in Austria since 1923 – comes anywhere close to the c. 60 km<sup>2</sup> ripped out annually by mechanical diggers in the name of (partially) BDA-permitted and perfectly legal development.

<sup>17</sup> Ownership, after all, is essentially the legal right to control the fate of something. And the current version of the archaeological provisions of DMSG is all about control of archaeology by archaeologists. What object is archaeological heritage is left entirely to the archaeological profession: due to the official interpretation of § 1 (1) and § 8 (1) DMSG in Austria, any man-made object the archaeological discipline (and for that, read: 'the archaeologists employed in the BDA') considers 'significant' is archaeological heritage, which gives archaeologists exclusive control over what is 'theirs' to control. Equally, what should happen to archaeological heritage is left entirely to the archaeological profession: only archaeology graduates are allowed to look for and recover archaeological heritage from the ground, and even those need to get a § 11 (1) DMSG-permit from the archaeologists in the BDA, which gives archaeologists complete control about what is to happen to this archaeological heritage (also see Karl 2011b, 169-202). Even chance finds are left almost entirely to the archaeological profession: these must be made available to the BDA on demand, who can also take possession of them for a period of up to 2 years for scientific research according to the provisions of § 9 (4) DMSG, which also gives archaeologists full control over this part of the archaeological heritage. That all this control is mostly theoretical rather than practical does not matter much: ownership is, after all, the legal right to control the fate of something, in difference to possession, which is actual control of the fate of something.